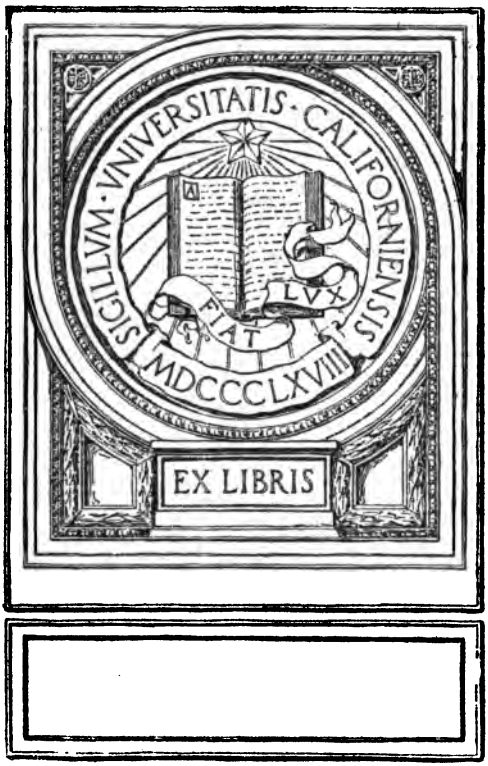
The Public Defender

Mayer C. Goldman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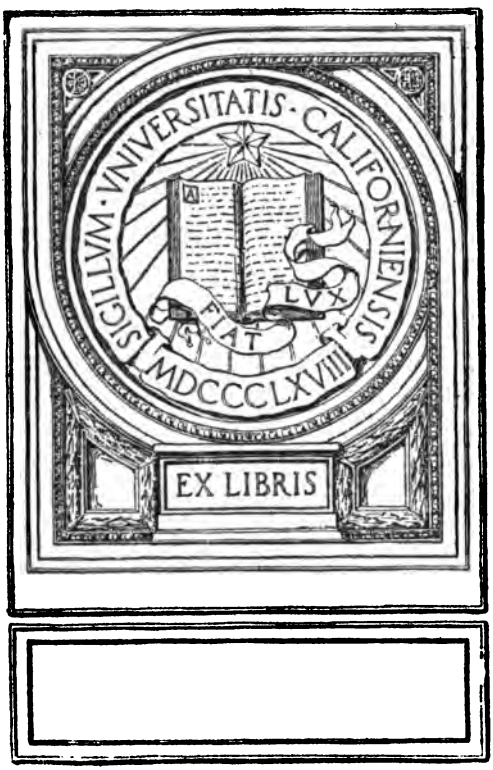
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The Public Defender

A Necessary Factor in the Administration of Justice

By

Mayer C. Goldman

Of the New York Bar

With a Foreword by

Justice Wesley O. Howard

Of the Appellate Division, New York Supreme Court
Third Department

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FOREWORD

MR. GOLDMAN'S book, *The Public Defender*, discusses a subject which seriously affects the rights and the liberties of the common people. The publication of this book is opportune. It merits deep study and careful consideration. Mr. Goldman's arguments are convincing and unanswerable. His learned and comprehensive treatment of the subject will stimulate and arouse a favorable public sentiment.

My experience as a district attorney and on the bench of the Supreme Court leads me to concur fully with Mr. Goldman in his contention that there should be a Public Defender to look after the rights of the poor. The creation of such an office would be not only justice, but economy.

The poor man cast into prison, no matter how innocent, is helpless and hopeless. He cannot cry out to justice, for nobody hears his

cry. He is the prey of the policeman, the captive of the jailor, the butt of other prisoners, the plaything of young lawyers. He is immured beyond human reach. His protestations of innocence are drowned by the ribald jeers of hardened criminals. He walks to the courthouse fettered to brutes and degenerates. He is browbeaten and threatened by his captors until his heart sinks in despair. As he is arraigned before the judge, he stares about the courtroom, but he sees no friend—no hope. Every technicality and delay and defense and avenue of escape known to the cunning of lawyers are available to the rich man indicted for crime. The poor man under indictment is permitted to go through the forms and appearances of a trial; but such a trial is only a mockery. He dares not assert his innocence for fear of a double sentence at the end of a trial—a trial which he knows will be a travesty. Therefore he pleads guilty and disappears from human view. And this is the triumph of civilization—a triumph for those who have money; ignominy for those who have not.

The provision for a Public Defender should

be imbedded in our statutes. No law could be more economical—none more humane.

W. O. HOWARD.

October 16, 1916.

SUPREME COURT CHAMBERS
APPELLATE DIVISION
TROY, N. Y.

PREFACE

AS a result of an address which I had the opportunity of making in New York several years ago, advocating the establishment of the office of Public Defender to represent indigent accused persons, the subject was taken up for serious discussion by numerous representative bodies including the Criminal Courts Committee of the New York County Lawyers' Association, the Law Reform Committee of the Association of the Bar of the City of New York, a special committee of the Brooklyn Bar Association, and committees of the Phi Delta Phi Club, Charity Organization Society, Citizens' Union, Brooklyn Bureau of Charities, and the Bronx County Bar Association.

I had the honor of preparing the Public Defender bills, which were introduced in both houses of the New York Legislature in February, 1915, as well as the proposed amendment submitted in May, 1915, to the Constitutional Convention of New York, and it was

my privilege to appear before its Committee on County, Town, and Village Officers, in support of the amendment.

To the best of my ability and employing all available means of communication with the public, I have endeavored to spread the gospel of this idea, and I have been much gratified by the response. I can see in this kindling of the public mind, only a growing realization of the necessity for this essentially humane office.

Despite the adverse reports of bar association committees and the inability thus far to secure favorable legislation in New York, and elsewhere, the movement has been generally accorded such enthusiastic and cordial approval from all classes of citizens, and the practical operation of the office is so uniformly successful in various communities, as to justify the belief that the public defender theory will be universally recognized throughout this country in the near future.

Because of the great National interest which is being shown in the public defender idea and in response to many requests for information on the subject, I venture to submit this little work—the first book on the subject—in the hope that it may help in some

small degree to point the way to a broader understanding of what is in many respects, one of our most urgent and important popular needs.

M. C. G.

New York, October, 1916.

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CHAPTER I

THE PUBLIC DEFENDER IDEA

SINCE the beginning of time, the world plea has been for justice. Yet, because of that strange irony which has run through all the ages, man has apparently been forced to struggle for this beneficent right. More especially have the destitute of every land been deprived of the privilege of impartial hearing. Now, after this long and costly denial of human rights, comes a tangible antidote in the form of a public defense, which gives every man, regardless of his race, creed or purse, an actual "equality before the law."

Such is the significance of the office of Public Defender to represent indigent accused persons. It means the democracy of justice.

The tremendous impetus given to this movement throughout the United States indicates the well-nigh universal demand for the elevation and improvement of our standard of procedure in criminal cases. It is becoming generally recognized that, in the administration of justice, an impartial search for the truth must be the paramount consideration.

Although many persons believe that, under our present system, persons accused of crime are already too carefully protected by various legal presumptions and technicalities, the prevailing sentiment undoubtedly is, that the administration of our criminal law is unsatisfactory, expensive and inadequate. There is sound basis for this criticism.

If, however, by the establishment of this office, criminal jurisprudence and the principles of human justice can be placed upon a more solid foundation, the suspicion now lurking in the public mind, that a discrimination exists between different classes of accused persons, will give way to a realization that the theory of "equality before the law" means exactly that.

The idea contemplates giving life and vitality to this much neglected theory and

actually securing to all the people equal opportunities to protect their legal rights. It means the "square deal" in the courts.

It is based on these important principles:

1. That it is as much the function of the state to shield the innocent as to convict the guilty.

2. That the "presumption of innocence" requires the state to defend as well as to prosecute accused persons.

If the ascertainment of the truth be the purpose of a judicial investigation, the conduct of a criminal trial necessitates the production of *all* the pertinent law and facts; the accused and accuser should have the same opportunity and resources to present their respective contentions; a trial should be an impartial judicial inquiry, rather than the waging of an unequal contest between the people on the one hand, represented by an able, experienced and powerful prosecutor, and the individual defendant, dependent upon such legal aid or skill as he may be able to get. The greatest triumph of the judicial system would be to secure equal justice to all persons, the rich and the poor, the strong and the weak, the accuser and the accused.

District Attorney Edward Swann of New York City (formerly a prominent criminal judge) said recently:

"The modern criminal trial is not an effort on both sides to arrive at the truth and the merits of the controversy, but a contest in which the district attorney tries to get the facts in evidence and the defendants try to keep them out by every means within the rules."

If this be true, is it not essential to improve the standard of trials so that they may become impartial investigations?

That there is an inherent weakness in the criminal law and in our method is evidenced by the constant criticisms which are being leveled against existing conditions. Leading newspapers and magazines have frequently commented on it in vigorous editorials. Distinguished lawyers, law reformers and sociologists have described specific abuses, and the general public has always had the impression that the poor man accused of crime is at a terrific disadvantage.

Have we now the most efficient system of establishing the truth? Is the contest between the people, with all the power, prestige and resources that such term implies, and the

person charged with crime, an equal one? Does the state protect the weak as well as the strong? If these questions be answered in the negative—and they must be—the need for a change is readily apparent.

The unjust conviction and penalization of innocence is as much to be avoided as the escape of guilt, and this is nominally recognized by all civilized law. The theory that "it is better that ten guilty men escape than one innocent man be punished," is ancient; all of us pretend to take it seriously; it is an axiom of the education of law students; every judge on the bench will unhesitatingly subscribe to it; yet it remains a fact that civilization, as a whole, runs to the prosecution of an accused man or woman with the enthusiasm of a pack of hounds in full cry after a fleeing hare. Mere accusation is enough to start the hunt. Society as a whole does not presume the accused innocent; it presumes him guilty. He, himself, must make the fight to prove his innocence. Nobody helps the hare. Everybody cheers the hounds.

The law recognizes the necessity for counsel, that right being a constitutional guarantee to

the accused. The suggestion for a public defender, means the substitution of a sworn public counsel, possessing integrity, ability, experience and power, for the incompetent, uncompensated, or indifferent lawyer who is often assigned to a helpless and impecunious prisoner. Assuming, however, that assigned counsel are often conscientious and skillful, it still obtains that, without proper facilities, they cannot successfully combat the power and resources of the prosecution. Because of this, important witnesses and expert testimony may not be available. Is it not a vicious system which permits a denial of justice because of one's poverty?

The public defender should be an elected officer; his compensation should be ample; he must be a competent, high-class type of lawyer; he should have necessary assistants and investigators; he should be as powerful and have the same official standing as the district attorney; and in certain cases and under certain conditions he ought to be permitted to go before the grand jury while a proceeding is pending before that body; as a sworn representative of the people, his recommendations to that body should be seriously considered. There may be valid objections

to this last suggestion. It is made here, less because of a mature conviction, than in the hope it may give rise to profitable or perhaps conclusive discussion. However, it seems reasonable that if the public defender, by his presence and standing before the grand jury, could prevent the finding of indictments which are not justified by the evidence submitted, or upon evidence which a petit jury would not regard as sufficient to convict, his usefulness in that respect alone would justify his existence, both ethically and economically. An indictment is merely a charge that a crime has been committed. The mere accusation, however, of having committed a crime discredits the accused before the public. The suggestion that it frequently menaces and often destroys him financially, physically and mentally, is wholly reasonable. Indictment has frequently resulted in social ostracism. Subsequent acquittal cannot undo the wrong. Neither do our laws provide any compensation to those innocently accused of crime. We might well profit by the example of the German law which indemnifies those who are the victims of legal injustice.

Indictments are too easily and too freely found. Too often they are procured upon

illegal or insufficient evidence; much too often, on account of public clamor, prejudice, malice, or perjured testimony.

If the public defender could demonstrate to the satisfaction of a grand jury that it ought not to find an indictment, or combat the desire of a district attorney to procure an unwarranted indictment, this function would be highly essential to the liberty of the individual and result in much economy to the state.

His function would not be to defeat justice —but to promote it. He should co-operate with the district attorney, whenever not inconsistent with his duty to his client, and wherever possible, in order to bring about an ideal administration of the law. His duty should be to protect the innocent—not to acquit the guilty. He should see that the guilty is fairly punished—not over-punished. His office should be represented in every phase of the proceedings wherein the district attorney appears, commencing at the preliminary hearing before the magistrate.

The public defender idea is neither revolutionary, novel, nor impracticable. It is amply justified by historical precedent, and by the procedure in foreign countries.

It has stood the test of time and experience.

An official called "Pauperus Procurator" appears to have existed under the Roman Papal Government, (Browning's poem, *The Ring and the Book*, vol. iii, p. 279).

There was such an official in Spain in the 15th century.

"In the cortez of Madrigal (1496) and still more in the celebrated one of Toledo (1480) many excellent provisions were made for the equitable administration of justice, as well as regulating the tribunals. The judges were to ascertain every week, either by personal inspection or report, the condition of the prisons, the number of the prisoners, and the nature of the offenses for which they were confined. They were required to bring them to a speedy trial and afford every facility for their defense. An attorney was provided *at public expense*, under the title of *advocate for the poor*, whose duty it was to defend the suits of such as are unable to maintain them at their own costs. . . . Severe penalties were enacted against venality in the judges, a gross evil under the preceding reigns, as well as against such counsel as took exorbitant fees, or even maintained actions that were manifestly unjust." (Prescott's *History of Ferdinand and Isabella*, vol. i., p. 194.)

The Spanish law now provides for the employment of counsel to represent indigents in both civil and criminal cases ("Las Leyes de Enjuiciamiento Civil y Penal"). In every district, a lawyer is registered who takes charge of the cases of indigents in turn.

The criminal code of Hungary provide specifically for a public defender in certain cases, viz:

"An attorney duly listed or the professor of a law university may be selected as defenders. (Sec. 55.)

"Without the public defender there cannot be had a final hearing or trial if the accused has no separate attorney. (Sec. 412.)

"The presence of the public defender is always obligatory except when the defendant has a separate defender. (Sec. 414.)"

In the Argentine Republic, the defense of accused persons unable to employ counsel is entrusted to the "Defensores de Pobres y Ausents" (defenders of poor and absents). These counsel are lawyers appointed by the Supreme Court of Argentina, for life, at a monthly salary. There are also public defenders for infants and insane persons.

In France, there exists an organization

called "L'Assistance Judiciare," through which persons without sufficient means are entitled to avail themselves of the protection of the courts. The bar in that country is unified into an order, assignments to the defense of indigent prisoners are made by the executive head of the order, from the bar in general, and accepted as obligatory. This insures to the defendant dignified and competent counsel.

In Belgium, in accordance with the law of July 30, 1889, covering judicial assistance to the poor, an indigent person has the right to choose a lawyer, who gives his services gratuitously. He is called a "Pro Deo" lawyer. A petition for such free procedure must be sent to the judge, who has the right to dismiss the petition or allow the "Pro Deo" lawyer's appointment, according to what his investigation as to the prisoner's circumstances develops. The procedure has this advantage, that the prisoner, by selecting his own attorney, cannot be heard to complain that he was dependent upon counsel who is unsatisfactory to him for any reason.

The Constitution of Mexico provides for the free public defense of its citizens, through the "Defensores de Officio," the number of

whom is stipulated in the "Ley Organica de Ministerio Publico." The constitution of each one of the Mexican states provides also, within the jurisdiction of the state, for the "Defensores de Officio," whose number is specified in the "Codigo de Procedimientos Penales" in some jurisdictions, and in the "Ley Organica," in others. The same general principle is followed, although the various states have different forms and laws.

The Norwegian act of May 22, 1902, concerning "procedure in criminal cases," prescribes that a lawyer must be assigned by the court for the defense of any person who is being tried for crime, the expense thereof to be borne by the state. This method of compensation insures a more adequate defense than a system of free counsel.

In England, counsel assigned to the defense of an accused person is paid by the government.

Under the criminal system in Denmark, the court appoints, in each case, a prosecutor and a defender for the accused person. Both of these are selected from a staff of public attorneys in the particular city or district, who have been appointed beforehand by the king to handle public cases.

The German criminal law marks an important advance over the criminal systems of other countries, in that it recognizes the right of an innocent person unjustly punished, to be *compensated by the state.* The two laws bearing upon this subject are worthy of note, viz.:

"Those defendants who have been acquitted upon a re-trial, may demand damages or compensation from the state if their punishment pronounced at the first trial has been put in operation, in whole or in part.

"Innocent persons who have been detained in custody before trial and who have been acquitted in criminal cases, may demand damages from the state, if the trial has established their innocence."

We can learn much from foreign jurisprudence, with respect to securing to accused persons the right to a fair trial, despite the so-called "safeguards" of our personal liberties.

This idea is also abundantly justified as humane, just and economical by the successful operation of the public defender's office in various American communities. This will be more fully shown in a subsequent chapter.

While the present movement is based primarily on the necessity for extending adequate and proper legal assistance to "indigent" accused persons, it is a mooted question as to whether or not *all* accused persons should not be defended by the state.

It is interesting to note, in this connection, that according to the "Wetboek von Strafvordering" (Code for Administering Penal Law) of The Netherlands, *any* person accused of crime may have counsel assigned to him, and that the privilege is not restricted to indigent persons. This counsel is chosen by the president of the court among the lawyers in his district.

There are many sound reasons underlying the theory of "free justice." A more progressive civilization may determine the question in time. The *immediate* problem is to guard against injustice to those unable to protect themselves.

CHAPTER II

THE INJUSTICE OF THE "ASSIGNED COUNSEL" SYSTEM

A DEFENDANT in a criminal trial is granted by the federal and the several state constitutions, the right to appear and defend in person or with counsel, any charge which is brought against him. He should not only be defended by counsel, but he should have the right to be defended by competent, honest and high-class counsel who can and will obtain the necessary evidence and witnesses in his favor.

The defendant of financial means usually employs able counsel and has the weapons with which to properly present his defense. He is released on bail, pending trial. The indigent accused—perhaps a foreigner—often ignorant—generally helpless—languishes in jail, utterly incapable of coping with the great forces of the state arrayed against him.

(The courts do appoint lawyers to defend such persons—but are they really defended? These attorneys serve without compensation, except that in some states a fee is paid in murder cases. In the absence of statute, counsel assigned are not entitled to compensation and are not at liberty to decline the appointment. On very rare occasions distinguished counsel is assigned to defend a prisoner, but, as a general rule, these assignments go to young and inexperienced attorneys—very often to the practitioner who happens to be in court at the time.)

The constitutional guarantee to be represented by counsel does not confer the right upon the accused to compel the court to assign him such counsel as he may choose.

At common law in England, counsel were not allowed to persons indicted for treason, unless some point of law arose. The protection of the legal rights of the prisoner was thus left to the presiding judge, whose bias in favor of the crown resulted, in the majority of cases, in great injustice to the accused. At the present day in England, the assistance of counsel is always allowed and counsel will be assigned if the poverty of the accused justifies it.

If it be the function of the public purse to pay for the defense of persons charged with murder, why should it not be equally a function of the public purse to pay for the defense of persons charged with minor crimes?

Although sending an innocent person to death in penalty for a murder which he did not commit is a very tragic and terrible thing, it does not destroy the seriousness of the fact of sending another man to prison for even a brief period, on conviction for a minor crime which he did not commit.

None but the prosperous, or those who are accused of crimes sufficiently sensational to induce attorneys to volunteer for their defense because of obviously latent possibilities of reputation, command, when they stand in court, an engine of defense at all comparable in efficiency to the engine of prosecution existing in the office of the district attorney.

The entire system of assigning counsel to accused persons is fundamentally wrong from every standpoint. It is as unfair to counsel as it is to the accused, wholly apart from the question of the character and ability of counsel. A lawyer should not be required to devote his time and professional skill gratuitously to the defense of a criminal prosecution

any more than the accused should be dependent upon the services of counsel working without compensation. If it is a lawyer's duty as an officer of the court, to render services to an accused person when required by the court, why should not the same principle hold true with reference to civil litigations? There is no authority which can *compel* a physician or other professional man to render services gratuitously, nor can we conjure up the possibility of a merchant being forced to donate any portion of his stock to the needy. While the latter procedure would most likely result in the merchant's claim that he could not be deprived of his *property* "without due process of law," yet lawyers may be forced to devote their time, energy, and skill—their professional assets—to the service of strangers. The fallacy of the assigned counsel idea is shown by the fact that it is deemed necessary for the state to pay counsel in capital cases. If it is important to compensate counsel for defendants whose lives are at stake, why is it not important to compensate those who represent accused persons whose liberty and good name are involved?

The classes of lawyers who are usually

assigned to defend, present a phase of this question which cannot be regarded as unimportant. It is a regrettable fact that in nearly all communities (particularly in the larger cities) there is a type of lawyers who are not truly representative of a great profession. Their regard for the rights and liberties of their clients is measured solely from a commercial or financial standpoint. These are more persistent than any other lawyers in their search for clients. Too frequently their services, if rewarded by small fees, are half-hearted or openly negligible. This leaves their clients practically or wholly unprotected. They are commonly referred to as "shysters," but also described by various writers as "snitch lawyers," "jail lawyers," "vampires," "legal vermin," "harpies" and by other inelegant but extremely emphatic phraseology. They are grasping and mercenary—without character, ability or conscience. They prey upon the ignorance or fear of the prisoner, or of his relatives or friends, in their effort to extort a fee. If it be not forthcoming (or often when it is) they advise the prisoner to plead guilty, on the pretext that he will get greater leniency from the court than by standing trial. He

may at times go through the forms of a trial, but the defense is perfunctory on its face, and the client pays the penalty, perhaps not for the crime charged, but often for his poverty.

Occasionally, the accused has the good fortune to have an experienced and capable attorney assigned to him. Busy lawyers have neither the time nor the inclination to neglect their more lucrative practice for the privilege of basking in the atmosphere of the criminal court. Therefore, the court usually assigns counsel from among the attorneys in attendance at the time, or who are present for the purpose of being assigned.

Frequently young and inexperienced attorneys are assigned. They are usually honest and painstaking and devote much time to the preparation of their cases. While they are glad to take unpaid assignments, the benefit they get from the experience is probably greater than that which their clients receive. Entrusting one's liberty to the tender care of a novice is fraught with danger. The experience may be most profitable to the young attorney—but extremely costly to his unfortunate client. The young attorney, as a rule, bent on achieving a favorable result,

is no match for the adroit, able, powerful and experienced prosecutor.

The judges probably do the best they can in assigning available counsel who are in court—their calendars are congested, the pressure of business is heavy, they are disinclined to assign busy counsel. Many judges probably feel, too, that their own conduct of the trial will preserve the fundamental rights of the accused.

The evils of the practice were forcefully pointed out several years ago, by Mr. Samuel Untermyer, a distinguished American lawyer, in an address in which he said:

"Unjust convictions among the poor and helpless and especially among our ignorant foreign population are more frequent than we care to admit. . . . The most prolific abuses occur in what are known as 'assigned' causes in which the defendants and their families are too poor to furnish bail or employ counsel. . . . They come to the bar of justice crushed in spirit, and if innocent, in mortal terror of the law and resigned to any fate. Their assigned counsel, whose retained clients are his chief concern, easily convinces himself that he has done his duty to his pauper client if the prosecutor will accept a plea of guilty to a lesser form of crime

or be content to recommend a moderate sentence. And so before the poor fellow knows what has happened to him and in less time than it requires to tell the story, he takes the advice hurriedly given him as he stands quivering at the bar and so he finds himself on the way to prison. . . . That such a system results in innocent men being branded and punished as criminals admits of no doubt."

Presiding Justice Almet F. Jenks, of the Appellate Division, New York Supreme Court, a distinguished jurist, in speaking of the public defender proposal before the judiciary committee of the New York Constitutional Convention of 1915, said:

"I believe there is a great deal in the idea of a public defender. I have seen so many poor, friendless, homeless wretches have their liberties put at stake through some inefficient tyro being named to defend them that I feel very strongly some change should be made."

Nobody knows better than the judges how often miscarriages of justice occur through indifferent or unskillful services rendered by assigned lawyers. The views expressed by Judge Jenks and others familiar with conditions must be given due weight. Accused

persons are entitled to a real defense—not a perfunctory one.

According to the figures published some months ago by the Court of General Sessions in New York County, it appears that in 1915 no less than 1495 persons had free counsel assigned to them in that court as against but 331 such persons in 1906. This indicates the need for providing counsel in New York alone. One may readily imagine how many indigent defendants are compelled each year to rely upon assigned counsel throughout the United States.

The claim has been frequently made, that because juries are prone to extend sympathy to defendants represented by the average assigned counsel, the indigent defendant really has an advantage. This would seem to be as strong an indictment against the character and ability of assigned counsel as possibly could be presented.

CHAPTER III

PUBLIC PROSECUTION AND PROSECUTORS

THE public prosecutor (or district attorney as he is frequently termed) is a public servant, representing the sovereign power of the state, by whose authority and in whose name, under the Constitution in most jurisdictions, all prosecutions must be conducted. He is vested with the right to determine, whether or not a criminal prosecution shall be pressed to trial. His powers are far reaching and his resources unlimited. Being the representative of the whole people, who create his office, he has the respect and the confidence of the courts. He is the legal adviser to the grand jury, attends its sessions, and presents charges against accused persons for its action. He is an important part of the public's machinery of justice.

It is constantly asserted that the district attorney, being a quasi-judicial officer, is

required to protect the rights of an accused person; that it is his duty to establish innocence as well as to prove guilt, and that, therefore, there is no need for such an official as a public defender. However alluring this viewpoint may be, and however we may be tempted to embrace it, the cold, sober truth is, that district attorneys are chosen to *prosecute* crime; the public pays and expects them to prosecute; their work and future success, political and otherwise, are often measured by the number of convictions they obtain. Even with the best intention to give an impartial and unbiased administration of their office, district attorneys, being mere human beings, cannot successfully play the double rôle of prosecutor and defender. If they were so perfectly constituted that they could properly safeguard the rights of the accused, there would be no need for private counsel to undertake defense—or for judge and jury to decide the law and the evidence. It is important to note that the law makes no provision for the district attorney to defend—his function is to *prosecute*—and the people demand a vigorous prosecution. There are many who assert that it is absolutely impossible for an innocent person to be con-

victed, that a miscarriage of justice is quite inconceivable, that a poor defendant is on an exact equality before the law with a rich defendant, that the average assigned counsel serving without compensation fully protects and defends the accused, that district attorneys are infallible and uniformly impartial—and they seek to convince us, that our very human agencies in the prosecution and trial of accused persons are so perfect that to criticize prevailing conditions lays one open to the charge of attacking our judicial institutions, or reflecting upon "constituted authority." The tender solicitude shown for "constituted authority" must give way, however, to the more important principle of meting out equal justice to all accused persons.

The numerous reversals by appellate tribunals of convictions based upon unfair trials, improper tactics, inflammatory appeals to the jury, or the prejudicial attitude of the district attorney, or even the trial judge, completely refute the assertion that the rights of the accused are always properly protected. Many prosecuting officers are men of the finest integrity and moral calibre—with a keen sense of justice. They would not consciously violate their oaths or work in-

justice. Serious exception, however, is taken to their claim—so often urged—that they can be both prosecutor and defender. For example, District Attorney Edward Swann, of New York County, said recently:

"I believe that the district attorney should exercise the functions of public defender. He is the attorney for all the people, including the prisoner at the bar. He should consider carefully the prisoner's rights and if he should discover any evidence in his favor he should present it unhesitatingly to the jury along with the other evidence. He should not permit the instinct of the advocate to obscure his sense of justice to the defendant."

Expressions of similar import have emanated from other prosecuting attorneys. While such sentiments reflect much credit upon them and indicate their own tendency to be judicial rather than partisan, it is humanly impossible for one official to adequately and fairly represent both sides of a controversy. While a conscientious prosecutor can do much to safeguard innocence, the true and logical solution, is not to entrust a defense to an official whose primary duty is to prosecute, but rather to one whose primary function is

to *defend.*" Only by the proper exercise of the different functions of two such officials, independent of each other in their respective duties of prosecution and defense—and yet harmonizing in their desire to establish the truth—is to be found the correct system of justice."

While many prosecuting attorneys may strive for fair verdicts, their zeal for victory and their methods of trial are very likely to cause injustice to the accused. The law reports, in various states throughout the country, abound with decisions in which appellate tribunals have reversed convictions and granted new trials on account of the improprieties, prejudice, or misconduct of district attorneys. The following cases from among the mass of decisions on the subject, will serve to illustrate this.

The Court of Appeals of the State of New York, in the case of *The People vs. Cascone, 185 N. Y. Reports*, at page 334, wrote in reversing a conviction of a defendant on a charge of attempted murder, viz:

"We close our review with the remark, made as a deliberate remonstrance against the necessity for frequent reversals in criminal cases, that too

many prosecuting officers run dangerous, foolish and unprofessional risks in order to secure a conviction. . . . Judgment of conviction should be reversed and a new trial ordered."

Chief Justice Cullen (although dissenting from the decision in that case) wrote:

"I join with my brother (Judge Vann) in reprehending the manner in which important criminal prosecutions are so frequently conducted at this time, often evincing ignorance of the ordinary rules of evidence or disregard for the interest of both the People and the defendant, which alike require that a trial should be had according to law."

In the case of *The People vs. Pisano*, reported in *142 Appellate Division, p. 524* (*N. Y.*), the Court, in reversing a conviction for attempted murder, stated in its opinion:

"A district attorney oftentimes encounters difficulties in the performance of his duties. He should be commended for zeal in prosecuting criminals but he should not allow his zeal to outrun his discretion, but if, in the heat of the contest, he oversteps the bounds of propriety, it is the duty of the presiding judge, who is presumed to occupy a position of cool impartiality, to check such outbreaks, advise the jury of the

impropriety thereof and warn them not to be affected thereby. Convictions of guilty men are desirable, but convictions must be had in accordance with established rules of law. From convictions otherwise obtained which Appellate Divisions are constantly compelled to set aside, no good, but positive injury, results."

In the case of *People vs. Wolf*, reported in *183 N. Y.* at page 464, the court in reversing a conviction of defendant for the crime of abduction, and granting a new trial, severely arraigned the conduct of the prosecuting attorney, saying:

"An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but upon the trial judge. However strong the evidence may be, if she did not have a fair trial, as shown by the rulings of the court subject to proper objections and exceptions, the judgment of conviction should be reversed and a new trial ordered. We have repeatedly laid down the rule governing prosecuting officers in addressing the jury and to govern trial judges also in their duty relating to the subject. We have repeatedly admonished both, the former at times with severity and the latter more mildly, not to depart from that rule,

but our admonitions have not always been regarded, although they were followed by a reversal of the judgment involved, founded solely on the improper remarks of the prosecuting officer and the failure of the trial judge to do his duty in reference thereto."

As was well stated by a writer on the subject, "intemperate zeal is the besetting sin of public prosecutors." The average prosecutor scents guilt—not innocence. Accusation is often equivalent to proof. He becomes impregnated with the atmosphere of guilt. It is quite significant of the prevailing tendency, that invariably, he boasts of his record for obtaining convictions—rather than to express his satisfaction that he had freed innocent men unjustly accused. As stated in a recent editorial:

"He usually gives the number of convictions secured by him and tells how many were acquitted by direction of the court and jury. No mention, however, is made of the number against whom proof of guilt either was wholly lacking, or evidence of it insufficient to warrant prosecution and who were therefore discharged on the district attorney's recommendation. The interest of district attorneys does not lie in advertising this part of the record."

The fallacy of the prosecutor's position is that he usually professes to be non-partisan, and he asserts that no innocent person will be convicted through his activities. But the fact is, that his principal claim to distinction is based upon the number of persons he has *convicted.*

There is a great opportunity for some district attorney to make a really great record. It will be that official who will take as great pride in saying that he *found one innocent man and set him free,* as in proclaiming the conviction of one hundred guilty men.

One of the serious evils of the administration of the criminal law is the practice, which has been freely indulged in, of supplying information to the newspapers of the secret proceedings before the grand jury. It has been openly charged and generally believed, that district attorneys supply news to the press in advance of a trial. While they are not always directly quoted, the fact is, that matters which should remain inviolate in the secrecy of the grand jury room are permitted, in some mysterious manner, to circulate as public news. This creates an atmosphere of prejudice against the accused and makes it

most difficult for him to overcome the prejudicial effect of "trial by newspaper."

Attention may be called to another distinct advantage which the district attorney may enjoy over the defendant's counsel. He can, and frequently does, make application for the appointment of a particular judge to try a specific case, of importance to the community—in other words, he selects his own judge. Would it not be considered most unusual and improper for an accused person to ask for the assignment of a particular judge to try his case? Would such a request be granted?

But without asking for a special judge, the district attorney may, in large communities, indirectly select his own judge by moving cases on for trial at such time as he may desire, and thereby bring them up at a term of court presided over by a judge of his own choice.

He may also compel poor prisoners to remain in jail until he finds it convenient to try their cases—a punishment that is not visited upon the defendant able to furnish bail.

The above instances may suffice to illustrate the proposition that the scales of justice do not always evenly balance.

The superior advantage which the prosecutor has in the matter of police assistance, the means to obtain expert testimony, the efficient machinery to get witnesses, cannot be denied. He is all powerful, awe-inspiring, resourceful and vigilant.

CHAPTER IV

ANALYSIS OF THE PUBLIC DEFENDER

IT is confidently asserted that the following benefits, among others, will accrue from the office of public defender:

1. The "theoretical safeguards" surrounding the accused will be rendered more effective.
2. Cases will be more honestly and ably presented.
3. Manufactured defenses will be reduced.
4. Unfair discrimination will be eliminated.
5. Disreputable attorneys will be unable to prolong cases.
6. Pleas of "guilty" will be minimized.
7. The truth will be more available.
8. Expense will be decreased.
9. The criminal courts will be improved.
10. Guilty persons will not receive excessive punishment.

(11). Confidence in and respect for the law will be increased.

Let us consider these various benefits under their respective classifications.

I

The "theoretical safeguards" surrounding the accused will be rendered more effective.

It is true that a defendant is surrounded with certain statutory safeguards; that certain legal formulæ are observed; that the "presumption of innocence" exists; that a preliminary hearing before a magistrate is accorded in almost every case; that there must be an indictment by a grand jury; that there must be a unanimous verdict of a petit jury; that the district attorney is presumed to possess a quasi-judicial character; that independent investigations are made by his office staff, as well as by a probation officer (in many jurisdictions), and that there are statutory directions as to proving guilt "beyond a reasonable doubt."

But does not the "presumption of innocence" carry with it many hardships up to the point where it is overcome by the proof of actual guilt? Doubtless many men pre-

sumed to be innocent and thereafter acquitted have been ruined by the cost of defending themselves. Nor does the state provide any compensation for the wrong. Despite this presumption, an indigent defendant is lodged in jail. He frequently must linger there for weeks or possibly months, without the means to obtain competent counsel or necessary witnesses. He must consort with rogues of all description. He must wage a contest against the great power of the state, lacking the weapons which are at the disposal of the state.

When it is considered, that a grand jury must have found an indictment before a defendant is placed on trial for felony, that fact must inevitably produce an impression on the mind of a petit juror. When he is brought into court under guard, without friends or hope, an adverse impression is created. Is there not really a presumption of *guilt*—which he must overcome—rather than a presumption of innocence?

Despite these so-called "safeguards," the accused is not usually represented by counsel at the preliminary hearing before the magistrate; he is frequently held by the magistrate in bail to answer, where the latter lacks the

courage to dismiss the complaint and prefers to place the responsibility upon the grand jury; prosecutors usually make a one-sided examination based upon the information furnished by the complainant; the grand jury proceeding is usually *ex parte;* the district attorney is the official adviser of the grand jury and his recommendations are usually followed by that body.

Unquestionably, a public defender is better able to safeguard the rights of the accused than the magistrate, the district attorney, or the grand jury.

The comments of judges and other officials having actual contact with this office prove authoritatively that, notwithstanding these elaborate "safeguards," the proposition urged under this headnote, is amply justified.

In Los Angeles, where the office of public defender has been in successful operation since January 1, 1914, it is quite significant that the district attorney (to whom the office did not at first appeal) wrote to Public Defender Walton J. Wood:

"I am thoroughly satisfied that there is a place in our criminal jurisprudence for such an office (referring to the office of public defender). . . .

You are performing a duty which this office has attempted to perform in safeguarding the rights of the defendant, but I believe under the circumstances your position gives you a better opportunity to perform that duty than the prosecutor has."

Judge Gavin W. Craig, of Los Angeles, has commended the office as thus far "satisfactory"; he believes "that it will be an established office," and that "it tends to the securing of a proper and just administration of the law."

Judge Frank R. Willis, of Los Angeles, stated that "the work of the public defender's office has been of an eminently satisfactory character," and that it "has usually been productive of a more fair and impartial administration of justice than the methods formerly employed."

Certainly, the opinions of these officials, who have been dealing with actualities, can be regarded as more persuasive than the prejudices of the opponents of the idea, who oppose established facts by asserting their own theories as to the present perfection of our criminal system. They cannot be charged with advocacy of a "Utopian

scheme" nor of being "misguided sentimentalists."

It is safe to assert that in communities which have adopted, or are about to adopt, the idea, defendants are likewise surrounded with statutory safeguards, and human nature, human experience and the trial of criminal cases are almost identical. If conditions in other communities warrant the establishment of this office, is it not fair to assume that the same necessity exists throughout the United States?

2 and 3

Cases will be more honestly and ably presented, and manufactured defenses will be reduced.

The law would not require nor expect a public defender to endeavor to acquit a guilty person, any more than that the prosecutor is expected to convict an innocent person; being a public official and a servant of the people, his sole interest would be to present the law and the facts in favor of the accused; with his experience, skill and resources he would be better able to present a meritorious defense, and he would not inter-

pose what he considered unscrupulous or perjured defenses.

It has already been pointed out in a preceding chapter, that young and inexperienced counsel cannot present defenses as ably as those who, by years of training and experience at the criminal bar, have become keen and alert in the trial of cases.

Various judges have said that other assigned counsel are not always conscientious or diligent in the discharge of their duties, among them, Judge Charles C. Nott, of the New York Court of General Sessions, viz:

"It is undoubtedly true that, in some cases, counsel so assigned do not use the same diligence or spend the same time upon a case that they would in a case where their services had been retained. This is especially true of subpoenaing witnesses. If the public defender's office were well and honestly conducted, I think on the whole its clients would be better defended than indigent defendants are now, and that a large number of perjured defenses would be eliminated and honest defenses or pleas of guilty substituted which would not only be conducive to good public morals but would save much time and labor in the courts and would reduce the calendar."

Criticisms have been made that a public defender would not be "endowed with a mind so enlightened, intelligence so acute, and judgment so infallible that he would be able to tell in every instance whether a defendant were innocent or guilty, and whether or not the defense interposed was founded on truth or perjury." Doubt has been expressed, that his conclusions "would be more profoundly accurate than that of the court, district attorney, and jury combined." These comments are quite wide of the mark. It is a generally recognized fact that perjured defenses are continually interposed.

District Attorney Swann recently called attention to the situation, saying:

"Perjury is on the increase in New York. In a substantial portion of the civil suits tried here perjury is committed, and this is even more true of cases tried in our criminal courts. Yet during the whole of the year 1915 not a single perjury case was brought to trial in New York County."

The public defender may not be any more accurate in discerning the truth or falsity of a defense than any other person, but it is more than likely that by reason of his office

and disinterested position, he would refuse to interpose a defense which he knew to be unscrupulous or perjured. Perjury strikes at the very root of our democratic institutions and any plan which tends to decrease this evil is worthy of serious consideration.

Judge Craig, of Los Angeles, has stated that the office of public defender tends to, in some cases at least, "securing for defendants a more able defense than they would otherwise have," while on the other hand "protecting the public from the use of methods which are sometimes questionable on the part of private defenders."

Numerous further authorities might be quoted, but it may be sufficient to note the opinion expressed by Judge Otto A. Rosalsky, of the New York Court of General Sessions, viz:

"It is true that a great many lawyers who are assigned to defend poor persons, other than for murder in the first degree (in which latter cases counsel are compensated), willfully neglect the interests committed to their care."

There is abundant authority therefore, for the statement that the average assigned counsel is not, as a rule, possessed of the

character and ability which should inure to the benefit of an accused person.

The questions have been asked "What is to become of the unfortunate defendant who refuses to be bound by the judgment of the public defender? Who would defend him if he refuses to comply with the demand that he plead guilty?" He is not bound "by the judgment of the public defender"; neither is it likely that the public defender would "demand" that he plead guilty. It may be assumed that, upon hearing the facts bearing upon the case of the accused, he would advise him that he should either stand trial or plead guilty; if the accused declined to plead guilty, it would be the duty of the public defender to present such facts as the situation warranted. He should not be compelled to do more than this. Private counsel oft-times advise a client to plead guilty. When he refuses to follow such advice and insists upon going to trial, counsel frequently acquiesces. Is there any material difference between private counsel and a public defender, in this respect? It must be borne in mind that the accused has the privilege of retaining private counsel if he so prefers, for any reason.

The assumption that indigent defendants are given to the practice of manufacturing defenses is warranted by the experience of judges and lawyers. It may be said that such practice is not necessarily confined to "indigent" defendants.

(It has been contended, that the creation of this office would "provide an additional instrumentality for defeating justice." On what theory this conclusion is based does not appear.) (Defendants are now entitled to counsel, and it is certainly fair to assume that a sworn public official would be less likely to attempt to defeat justice than the average type of assigned counsel would.)

The suggestion so often made, that the professional criminal would be quick to see the advantage which representation by a disinterested public defender would give him before a jury, is without merit. The "professional criminal" would not be likely to call for the services of this official for obvious reasons. Most likely he would give the public defender a wide berth. He would probably assume that a public defender would not be a party to a defense which is not legitimate. The indigent defendant, who is *innocent*, would be the only one really

benefited by the services of the public defender—except that the guilty would be saved from over-punishment.

Because the public defender of Los Angeles said that "nearly every person accused of crime in the Superior Court, upon being arraigned, has called for the services of the public defender," and that such situation "speaks eloquently of the need of such an official," it is feared by many that a like situation would become universal.

The opponents of the plan have urged that the popularity of a public defender in "criminal circles" would be beyond measure; they assert that "he has already won the unanimous support of those accused of crime." They overlook, however, the fact that he has also won the unanimous support of the officials charged with the duty of punishing crime—and the further fact, that persons accused may be *innocent*, and that the law presumes them to be innocent.

Curiously enough, an editorial published in *The Mutual Welfare League Bulletin* of Sing Sing Prison, New York, on June 26, 1916, opposes the establishment of a public defender for several reasons—thus refuting

the claim that such office will be welcomed in "criminal circles."

If it should be necessary for all persons to have the aid and advice of a public defender in order to establish their innocence, the state should provide such relief, regardless of the question of expense, in order to maintain the presumption of innocence. Even the "crook" is entitled to a fair trial—despite a criminal record.

It is urged that, if this official were assigned to every case of an indigent defendant, "the administration of justice would speedily degenerate into a howling farce." The Los Angeles situation completely refutes this contention.

4

Unfair discrimination will be eliminated.

Despite the doubts of bar association committees and others, there is a solid basis for the conclusion that our courts (not only the criminal but the civil courts) are for the rich and not for the poor; that the wealthy defendant who can employ competent counsel and resort to technicalities and obtain the delays which the law permits to those having

the ability to take advantage of them, and who can pay for the attendance of witnesses, experts and favors, has a pronounced superiority over the poor, ignorant or helpless prisoner, who must take what is thrust upon him. It is scarcely necessary to support this proposition by argument—the history of mankind amply sustains it.

So distinguished an authority as ex-President Taft called attention to this discrimination when he said:

"Of all the questions which are before the American people, I regard no one as more important than this, to wit: the improvement of the administration of justice. We must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man, and under present conditions, ashamed as we may be of it, this is not the fact."

The "Committee on Criminal Courts" of the Charity Organization Society of New York City, in a pamphlet entitled *Justice for the Poor*, made the statement:

"This confinement of so many men for such long periods is not inflicted upon them because of any fact connected with the alleged violation of the laws but just because they are too poor to

get bail. It is escaped by the men who have money or friends. It is not imposed upon the prisoners because they are guilty. It is what they get for being poor."

It must be admitted that no human system of administering justice can be devised which will not bear more severely upon the poor man than upon the rich. The public defender, however, would afford the innocent a proper defense, would secure for him a speedier trial, and would stand as his champion—armed with sufficient resources and power to prevent unfair discrimination.

5 and 6

Disreputable attorneys will be unable to prolong cases, and pleas of "guilty" will be minimized.

It may be assumed as a matter of common knowledge, that there are disreputable attorneys—(some are uncharitable enough to believe that all attorneys are). Experience has shown that many lawyers seek delays and postpone trials while endeavoring to extract fees from the relatives of the accused.

Such conditions exist in most large cities. Jurors and those coming in contact with the

criminal courts are familiar with them. Public Defender Wood has called attention to this class of lawyers, saying that one of the benefits obtained by him is "that the coterie of 'jail lawyers' who hang about jails has been almost eliminated in Los Angeles."

The general opinion among members of the bar is that it is an unpleasant duty for counsel to receive assignments to defend persons, other than in capital cases. Defendants frequently plead "guilty" because assigned counsel urge them that such plea will secure them a lighter penalty than if they were to stand trial and be convicted. The matter of obtaining compensation from a particular defendant would not influence the public defender in advising his client, nor need he seek delay in order to obtain fees; the state provides his salary—he has no interest in prolonging litigation. He has a duty to the state—as well as to the accused.

7

The truth will be more available.

This proposition does not "presuppose that the public defender would possess that quality of an unerring intuition which would

enable him to determine at once where the truth lies." (It simply means that the truth could be gotten at, because the public defender will not only be more skillful, competent and conscientious than the average assigned counsel in bringing out all the facts and the law, but that through his power and resources he will be able to obtain the evidence of the facts.) It is also quite likely that the accused will speak more freely and with more confidence to a sworn public official, having a definite standing and character, than to the assigned counsel, of the type referred to. The experiment in various cities, particularly in Los Angeles and Omaha, has demonstrated the truth of this assertion.

8

Expense will be decreased

The most persistent objection to the public defender idea is that it will result in an increased expense to the public. This phase of the subject has been regarded as of supreme importance by most opponents of the plan.

Assuming, for the sake of argument, that additional expense would result, would the cost not be amply justified:

(*a*) If a real equality would be secured to all classes?

(*b*) If a higher standard of human justice is reached?

(*c*) If the criminal law is improved?

In order, however, to demonstrate that *economy* would result rather than added expense, it is interesting again to note the Los Angeles viewpoint.

The comment of Judge Frank R. Willis is most significant, viz:

"It (the public defender's office) has been a great saving to the county in the matter of expense and has usually been productive of a more fair and impartial administration of justice than the method formerly employed of appointing attorneys unfamiliar with criminal law to represent the defendant's interest. I am well satisfied with the efficiency of the office and of the necessity for its continuance as matter of *economy and justice.*"

Public Defender Wood, in an article published in the *Southwestern Law Review* in June, 1916, stated:

"Another unexpected result from the establishment of the office of public defender is the *reduction of expense to taxpayers.*"

The comment of the Omaha public defender is also illuminating on this question. He said:

"The examination by the county attorney and public defender in all alleged crimes, results in many judgments by the court satisfactory to both the state and the accused, thus saving Douglas County considerable sums that would otherwise be expended in useless trials."

It must be apparent that the expense of the office would be more than offset by the reduced cost of prison maintenance and prosecution, by the saving of the court's time in passing upon frivolous demurrers, motions for new trials and such matters; by the elimination of baseless appeals, by avoiding the trial of spurious defenses and the saving of cost of counsel fees in capital trials (in states which compensate counsel in such cases).

9

The criminal courts will be improved

While the majority report of the Criminal Courts Committee of the New York County Lawyers' Association conceded that, "as an abstract proposition," a public defender of

the type and character suggested might be helpful, and that he "would undoubtedly eliminate the fact of occasional neglect of duty by assigned counsel," it opposes the assertion that the public defender would be likely to otherwise improve upon existing conditions. The report expresses doubt as to how the tone of the criminal courts will be uplifted by the "spectacle of daily forensic combat between the district attorney and the public defender." There is now daily combat (not necessarily "forensic") between the powerful prosecutor and assigned counsel. It is not apparent how the spectacle of a *more equal* combat would be unwelcome. Is not the whole theory of "combat" in the courts fundamentally wrong? Is not the sole function of a judicial inquiry to ascertain the truth?

Popular respect for the courts would be increased, if both sides of a controversy were fairly and ably presented.

It does not follow that these two public officials would in all instances exert their efforts in opposite directions to secure a favorable result for his side of the controversy. Both officials, would realize that it is the duty of each to try to bring about exact justice, without fear or favor.

The solution of this problem must necessarily depend upon the individuals, who occupy the respective offices. Assuming that both officials are of the proper type and character, there is every reason to believe that they would co-operate to protect both society and the accused and to bring about a fair administration of the law.

10 and 11

Guilty persons will not receive excessive punishment, and confidence in and respect for the law will be increased.

The public defender would be of great assistance to the court, to the accused, and to society. He would present to the court important facts bearing upon the case, the necessities of the accused or other mitigating circumstances which perhaps forced him to the commission of crime.

The probation system, now in vogue in many jurisdictions, is no doubt helpful in ameliorating conditions to a large extent. Yet, the legal mind, the prestige and responsibility of a defender to see that justice is done, would be infinitely more valuable. His duty, as well as his responsibility, would

necessarily be greater than that of a mere probation officer.

The question of inflicting punishment or of extending probation is tremendously important. It should be determined only after a most diligent and comprehensive inquiry into the previous history, environment, physical and mental status of the accused.

If the state, by a proper corrective system and an extension of the probation plan, could restore the prisoner to society and his family, he might work out his own salvation, under proper auspices. Incidentally, the cost of his maintenance in a penal institution would be saved. Society and the accused would both benefit.

Those serving prison terms, impressed with the idea that society is discriminating against them in the matter of punishment, must necessarily nurse a grievance against society and the judicial system, of which they believe themselves to be the victims. This produces in them a spirit of revenge and hatred—both inimical to the state. The harm done to society by discharged convicts cherishing resentment because of excessive punishment, is incalculable.

Would it not awaken confidence, were we to make the poor malefactor feel that he had the same privileges which the law extends to the rich? Should we not convey to the guilty a sense of fair punishment?

In line with modern theories of penology, a legal system which inspires confidence and respect would seem to be vastly superior.

CHAPTER V

THE ANCIENT CONCEPTION OF CRIME

THE suggestion has been frequently made, that the state, or the community, should not protect an individual who commits an offense against society. The reason assigned is, that inasmuch as the people prosecute, they should not also defend. It is not true, however, in the ordinary criminal prosecution, that society as a whole is interested in punishing the alleged malefactor, or has the slightest concern regarding his case. In numerous instances, John Doe has a personal grievance against Richard Roe. In order to gratify a personal enmity or grievance, he sets in motion the machinery of the criminal law. The proceeding is entitled "*The People* versus Richard Roe"—the indictment sets forth an offense against "*The People*"—and the generally accepted theory is, that the whole community has been assailed, by reason of the act charged against

the defendant. In truth, the community is generally indifferent to, or ignorant of, the personal quarrels or animosity existing between the two individuals, giving rise to the criminal proceeding.

It is well known that the criminal courts are often resorted to for the purpose of enforcing what are purely "civil claims." An indictment proclaiming that "*The People*" are prosecuting "Richard Roe" is apt to be misleading, when the facts of a particular prosecution are carefully investigated.

It is interesting to note, in this connection, the *ancient* conception of crime. What we now regard as "*crimes*" were not classified as such, in primitive jurisprudence. Only extraordinary offenses were punished as crimes—private compensation was usually awarded for the offense charged.

Sir Henry Sumner Maine, in his celebrated treatise (*Ancient Law*, p. 271), makes this statement:

"The penal law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrongdoer by an ordinary civil action and recovers com-

pensation in the shape of money damages if he succeeds. If the Commentaries of Gaius be opened at the place where the writer treats of the penal jurisprudence founded on the Twelve Tables, it will be seen that at the head of the *civil wrongs* recognized by the Roman Law stood *Furtum* or *Theft.* Offenses which we are accustomed to regard exclusively as *crimes* are exclusively treated as *torts*, and not theft only, but assault and violent robbery, are associated by the jurisconsults with trespass, libel and slander. All alike gave rise to an Obligation or *vinculum juris*, and were all requited by a *payment of money*. This peculiarity, however, is most strongly brought out in the consolidated laws of the Germanic tribes. Without an exception they describe an immense system of money compensations for homicide, and, with few exceptions, as large a scheme or compensation for minor injuries. 'Under Anglo-Saxon Law' writes Mr. Kemble (*Anglo-Saxons*, i., 177), 'a sum was placed on the life of every free man according to his rank, and a corresponding sum on every wound that could be inflicted on his person, for nearly every injury that could be done to his civil rights, honor, or peace; the sum being aggravated according to adventitious circumstances.' These compositions are evidently regarded as a valuable source of income; highly complex rules regulate the title to them

and the responsibility for them. . . . If, therefore, the criterion of a delict, wrong or tort be that the person who suffers it, and not the state, is conceived to be wronged, it may be asserted that, in the infancy of jurisprudence, the citizen depended for protection against violence or fraud not on the *Law of Crime* but on the *Law of Tort.*"

According to this author, "the idea of offense against the state or aggregate community did not at first produce a true criminal jurisprudence."

The same author points out:

"When the Roman community conceived itself to be injured, the analogy of a personal wrong received was carried out to its consequences with absolute literalness, and the state avenged itself by a single act on the individual wrongdoer. The result was that, in the infancy of the commonwealth, every offense vitally touching its security or its interests was punished by a separate enactment of the legislature. And this is the earliest conception of a *crimen* or Crime—an act involving such high issues that the state, instead of leaving its cognizance to the civil tribunal or the religious court, directed a special law or *privilegium* against the perpetrator. Every indictment therefore took the form of a

bill of pains and penalties, and the trial of a *criminal* was a proceeding wholly extraordinary, wholly irregular, wholly independent of settled rules and fixed conditions. Consequently, both for the reason that the tribunal dispensing justice was the sovereign state itself, and also for the reason that no classification of the acts prescribed or forbidden was possible, there was not at this epoch any *Law* of crimes, any criminal jurisprudence."

Our *modern* systems of jurisprudence differentiate more strongly between offenses against the state and those against the individual. The two classes of injuries are now more clearly defined. Nevertheless, it is still true that what we are accustomed to regard in the present day as "crimes" or "public wrongs"—and bear the stamp of public prosecution—are in reality but "private wrongs," seeking a remedy through public sources.

John Austin in his celebrated *Lectures on Jurisprudence* (p. 195) writes:

"The terms 'public' and 'private' may be applied indifferently to *all* law. . . . *All* offenses affect the community and *all* offenses affect individuals. . . . Only in the differ-

ence of procedure, and not in any distinction between the tendencies of the acts, lies the distinction between crimes and civil injuries. An offense which is pursued at the discretion of the injured party or his representative, is a civil injury. An offense which is pursued by the Sovereign or by the subordinates of the Sovereign, is a crime. In many cases (as in cases of libels and assaults) the same offense belongs to both classes. That is to say, the injured has a remedy which he applies or not as he likes; the Sovereign reserves the power of visiting the offender with punishment."

Mr. Austin explains further (p. 370) the origin of the term "public wrongs" as applied to crimes, and observed that they acquired this name from a mere accident, from the fact that crimes were originally tried by the sovereign Roman people. He shows that:

"The original reason ceased when the jurisdiction in criminal causes was removed from the people and vested in subordinate judges. But the name remaining, it was supposed afterward, by the Roman jurists, that crimes were called public wrongs, because they affected more immediately the interests of the whole community. . . . The distinction between civil in-

juries and crimes rests not upon any difference, in their consequences and effects, but upon the different way in which they are pursued. The distinction, although grounded on expediency, is arbitrary in its scope: that is a civil injury in one system of law which is a crime in another."

When we consider the subject of "public wrongs" and "private wrongs" from an historical viewpoint, it is apparent that the distinction between them is more fanciful than real. (The assumption that the people must prosecute but may not defend is not warranted from either the standpoint of justice or expediency. The state owes an equal duty to all its citizens.)

CHAPTER VI

SPECIFIC OBJECTIONS CONSIDERED

a

A SOMEWHAT amazing contention has been urged, to the effect that "crimes and criminals would be increased" by the establishment of this office, because of the proposed championship at public expense of every "professional criminal." Such contention must necessarily fall of its own weakness. Crime is the result of poverty or of physical and mental disease. A public defender will no more increase crime than capital punishment will decrease murder. Certainly a sworn public official, having a definite duty both to the state and to his client, would not contribute to any such extraordinary result.

b

Another objection asserted, is that there would be no one to defend the indigent prison-

er who refused to plead guilty on the advice of the public defender. This objection loses its point, when it is recalled that under the present system the accused is not entitled to successive lawyers until he can find one who advises him to stand trial. With private counsel assigned to him, he must either follow the advice of counsel or rely upon his own resources. In what manner the substitution of official, reputable and able counsel will more seriously jeopardize his position is not apparent. It is interesting to note, however, the published statement by the public defender of Omaha, viz: "that, without exception, I have found the prisoners willing to discuss their cases freely and fully, and to follow the advice given."

c

Much criticism has been leveled because of the claim that a public defender would defend only those whom he believed to be innocent. He would also properly advise the guilty. A wide range of discussion has been had for many years as to whether or not a lawyer is justified, from an ethical standpoint, in defending a man whom he knows or be-

lieves to be guilty. It has been often said that Abraham Lincoln refused to undertake the defense of any person whom he believed to be guilty of the crime charged against him. Judge Peter W. Meldrim, a former President of the American Bar Association, in a recent article concerning Cicero, the great Roman advocate, said:

"He has been severely assailed because of his defense of persons charged with crime and generally supposed to be guilty."

The consensus of opinion among lawyers is that every accused person is entitled to a defense. But the law does not require an attorney, in return for pay, to use his skill and ability to defeat the law and save the criminal from the consequences of his crime.

Private counsel is not open to criticism because he refuses to defend a guilty person. A district attorney is not expected to, nor should he, prosecute a person whom he knows or believes to be innocent. Why, therefore, should a public defender be criticized for a failure to defend one whom he believes to be guilty? "It's a poor rule which won't work both ways."

It is well to remember that we have not as

yet reached a state of ideal perfection. Society is composed of very human elements. Public defenders may not be perfect—neither are district attorneys, judges, or ministers—nor mankind in general.

Did not Lincoln really sum up the true function of a lawyer when he said:

"I am not bound to win, but I am bound to be true.

"I am not bound to succeed, but I am bound to live up to what light I have.

"I must stand with anybody that stands right; stand with him while he is right, and part with him when he goes wrong."

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Perhaps the most ingenious argument advanced in favor of the present system is that which urges the soundness of our judicial structure by the assertion that although an indictment be unfounded, or a conviction grossly improper, the appellate courts are available for the purpose of righting the wrong and seeing that justice is done. Ergo, no innocent person need suffer. Quite true, if the innocent person rejoices in the possession of sufficient means to indulge in the

luxury of an appeal. But what becomes of the unfortunate who languishes in jail, without money to pay counsel or to prosecute his appeal? He is precluded from testing the majesty of the law—because of the crime of poverty. A magnificent theory—but hopelessly impracticable.

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Considerable stress has been laid by bar association committees, in opposing the public defender movement, upon the fact that specific instances of innocent men being sent to prison have not been shown. It is somewhat difficult, for many reasons, to furnish specific proof of cases where innocent men have been imprisoned after conviction for crime. Nevertheless many convicted persons have constantly asserted their innocence or have been inadequately defended by uncompensated assigned counsel, and there have been many instances reported of unfair trials, of numerous reversals by appellate courts, of innocent men ruined by baseless indictments. The public defender theory does not necessarily rest upon the number of innocent men *convicted after a trial.* Miss

Kate Barnard, a distinguished sociologist, expressed the opinion that:

> "Ten per cent or thereabouts of all the prisoners in the American prisons to-day are there because they pleaded guilty in order to secure the minimum sentence, simply through their personal poverty or personal fear—a poverty that would not permit them to secure legal advice competent to maintain their plea of innocence against the splendid ability of the paid prosecutors of modern civilization."

It is manifestly impossible to correctly estimate the number of those who are the victims of our system of "assigned counsel." How many innocent men have pleaded "guilty" at the suggestion of assigned counsel, because of the latter's indifference or desire to escape the burden of trial, it is impossible to state; their number must be legion.

But, whether the figures be ten per cent. or one per cent., if we can prevent or minimize miscarriages of justice by better protecting the rights of the accused, by protecting the reputations of innocent men against illegal or improper indictments, by sparing them confinement in jail for unreasonable periods

pending their trials, by impressing the innocent with confidence in, and the guilty with respect for, the law, the necessity for the change proposed must be apparent to the unprejudiced mind.

Attention may be called, however, to the following cases, wherein convictions were had after trial.

In a book entitled *Twenty Years in State Prison*, the case of Alfred Schwitofsky is reviewed with great detail. It shows the conviction of an innocent man and a grave miscarriage of justice. The author, a chaplain of the New York City Prison and of the Sing Sing Prison in New York, states that he "can recall a number of such cases as having come under his notice." The case was also discussed in the *Outlook* of January 24, 1914.

Schwitofsky was sent to State Prison for a term of twenty years for burglary and felonious assault. In June, 1914, the State Board of Parole held a hearing which was brought about by the prison chaplain, the secretary of the Prison Society of New York, a well-known editorial writer and two prominent lawyers. At such hearing the prisoner told a remarkable tale of police hounding, declared

his innocence of the charge and produced witnesses to corroborate his story. He told (according to the *New York Times* of June 9, 1914):

"how three lawyers had been assigned to his case who had practically ignored him, of how he had been identified by persons under duress, of how he had not been able on account of his lack of means to produce a single witness in his defense, of how he had not been allowed to explain many things that counted against him at his trial, of how important witnesses had been ignored."

It was also reported that the most effective incident in Schwitofsky's interest was an admission of the Assistant District Attorney, who represented the state, "that the District Attorney had become convinced by reason of newly discovered evidence, that Schwitofsky was not guilty of felonious assault, upon which charge ten years of his twenty years' sentence was based, and that the District Attorney was willing to recommend to the Governor that this ten years' sentence be revoked by a parole or pardon." On September 18, 1916, Governor Whitman commuted Schwitofsky's sentence.

Nothing in the legal history of recent years

could perhaps more clearly demonstrate the great necessity for the general establishment of a public defender than the conviction of murder rendered against Leo M. Frank in Atlanta, a case which is still fresh in the public mind. The whole atmosphere of his trial reeked with class hatred, prejudice, and bigotry; nearly the entire local press, public and clergy clamored for conviction from the outset; the militia was called out to preserve order during the trial, and feeling ran so high that the jury was practically forced to find him guilty, although this was done principally upon slender threads of evidence supplied mainly by an easily discredited witness, whose criminal record was established and who confessed to being an accessory after the fact. It was openly charged in the press, and elsewhere, that the prosecution in the case was unduly prejudiced against the prisoner, that evidence favorable to him was suppressed, that the prosecutor's closing address to the jury was calculated to and did inflame their passions and arouse their prejudices. The trial has frequently been mentioned as an example of the effort not to bring out the truth, *but to secure conviction.* After the verdict had been rendered, the trial

judge openly announced that he had been unable to form a definite opinion as to the prisoner's guilt or innocence from the evidence. Subsequent events and investigations have added to the original doubts as to Frank's guilt. Justice Holmes, of the United States Supreme Court, declared in certain proceedings pending in that court, that he "seriously doubts if Frank had due process of law." Outside of the local atmosphere, the public sentiment was generally favorable to Frank. Here was an instance where the technicalities of the law were permitted to supersede justice. Whether Frank was innocent or guilty, however, is not the question; he certainly did not receive that fair trial to which he was entitled under the law. It is true that he was defended by distinguished counsel—and in that respect, he was no doubt defended as well as he could have been by private counsel. Had there been, however, a *public official* representing him, with the prestige of the state behind him, insisting upon the production by the people of all available evidence favorable to the prisoner, with the right and power to use the detective and police force, if necessary, in pursuing his investigations, with the courage to combat

public prejudice, a very different complexion might have been placed upon the case and the nation might have been spared what will doubtless go into history as one of its greatest legal scandals. There can be no question but that, throughout this country, a large number of impartial persons will retain a lasting impression that an innocent man was put to death.

The contention of the opponents of the public defender idea, that it is impossible for an innocent man to be convicted of crime because of the "safeguards" offered by our laws, has been weakened by the facts developed in the case of Charles F. Stielow, which has recently occupied the attention of the New York courts. Stielow, the victim of a "third degree" confession, convicted of murder, four times in the shadow of the electric chair and snatched from the jaws of death at the last moment, affords a striking illustration of the possibilities of judicial murder. Stielow owes his life solely to the persistent and unselfish efforts of a group of private individuals who volunteered to champion his cause. While the result achieved is a triumph of innocence over manufactured guilt, it is a sad commentary on our system of

jurisprudence that the state was so powerless and inefficient to prevent the wrong committed by it. This case strikingly illustrates the need for a public defender.

CHAPTER VII

OTHER REMEDIES INADEQUATE

THREE plans have been enthusiastically urged by various opponents of the public defender idea (among them various bar association committees) which it is claimed will be an effective "cure-all" for the present difficulties.

They are:

I. That the local bar associations should furnish a corps of reputable attorneys to volunteer their services as counsel for indigents.

II. That legal aid societies or other voluntary charitable organizations should undertake the defense of such persons.

III. That the trial judge should be empowered to fix compensation to counsel in each case, such compensation to be paid by the county.

Not one of these proposed remedies affords an adequate solution of the question. The

mere suggestions, however, indicate that existing conditions require some remedy, even though those who offer them have persistently denied that any change of system was needed.

I.

If the situation could be materially improved by the co-operation of the bar associations in supplying a list of volunteer attorneys to the court, is it not singular that they have not heretofore adopted such a course? Certainly, they cannot plead ignorance of criminal court conditions. Why have not the judges, who know the need for competent counsel in assigned cases and who have the power to designate proper counsel, requested the assistance of the bar associations, in an endeavor to promote the administration of justice? The answer is very simple—reputable and busy lawyers do not care to volunteer their services for this unproductive work, and the judges are not inclined to assign them—except in rare instances and in capital cases. And, as has been pointed out in a preceding chapter, it is unfair to expect a lawyer to devote his time and skill to such gratuitous service.

II.

While legal aid societies have done splendid work and should be encouraged, the argument that they will afford a sufficient substitute for, and render unnecessary the establishment of public defenders is wholly without merit. First, such associations are generally handicapped by lack of sufficient funds, as has been evidenced by their frequent and urgent appeals to the public for financial support. Aside from this, however, there is a more potent and fundamental objection to the plan. An accused person should not be dependent upon any form of *charity*, individual or organized, for the resources or opportunity to present a merited defense. He should be entitled as a matter of abstract right to be defended by a sworn public official, who would have a positive duty, as well as the power and standing, to protect properly his interests. Neither private nor public charity, no matter how meritorious, will avail as a sufficient substitute for the denial of a legal requirement. Justice—not charity—is the universal need.

III.

The third plan proposed, that of compensating assigned counsel, is also open to serious objection, by making it possible for the judges to show favoritism to certain lawyers, and thus lead to abuses—of which the "referee system" in civil cases is a conspicuous example. The compensation awarded would be hardly sufficient to induce experienced trial counsel to accept the cases. Furthermore, the aggregate of fees paid to counsel under such form of assignment would most likely result in a greater expense to the community than the creation of a public defender—without the benefits accruing from such defender.

CHAPTER VIII

THE MARCH OF THE MOVEMENT

IN March, 1912, the first public official designated as a "Public Defender" was established in the United States. Miss Kate Barnard, then Commissioner of Charities and Corrections in the state of Oklahoma, designated Dr. John H. Stolper as "General Attorney for the Commissioner of Charities and Corrections and as Public Defender of the state of Oklahoma." Although he rendered conspicuously valuable services to the people, his functions and duties were widely different from the type of public defender now being generally urged by the leading exponents of the movement. Therefore, the experience gained from his office is not important in the discussion of the present plan.

During the year 1913, the people of Los Angeles County adopted a charter (subsequently ratified by the State Legislature)

providing for the appointment of a public defender. It provides among other things:

"Upon request by the defendant or upon order of the court, the public defender shall defend, without expense to them, all persons who are charged in the Superior Court with the commission of any contempt, misdemeanor, felony, or other offense."

On January 6, 1914, Hon. Walton J. Wood became the first public defender in the United States of the type generally advocated, and he has served in such office with great distinction and ability. His conduct of the office has amply justified the necessity and reasons for its existence. In June, 1915, a separate public defender was appointed for the police courts of Los Angeles.

A voluntary public defender was appointed for Houston, Texas, in June, 1914.

In May, 1914, a voluntary public defender was appointed at Portland, Oregon, through the co-operation of one of the judges and the bar associations.

During March, 1915, Mr. David Robinson was appointed the first official public defender for Portland, pursuant to a resolution of the City Council, which created the office.

In November, 1914, a voluntary public defender was appointed at Evansville, Ind., by the Mayor.

In September, 1914, a voluntary public defender was established at the city of Temple, Texas.

Mr. Richard S. Horton, of Omaha, became public defender for Douglas County (Omaha), Nebraska, pursuant to an act of the State Legislature, in July, 1915.

On December 1, 1915, Mr. Rollo H. McBride, was appointed public defender of Pittsburg, Pa., by the Mayor of that city.

In February, 1915, the Municipal Council of the city of Columbus, Ohio, appointed Mr. Cecil J. Randall as public defender of the city of Columbus.

It is significant that all of these officials gave their unqualified endorsement to the practical and successful operation of the office and have expressed the hope that the office will become universal in scope.

Many distinguished lawyers, judges, sociologists and others, familiar with criminal court conditions, have cordially approved the plan; religious, labor, welfare and other civic organizations have passed resolutions favoring the public defender idea.

(During the year 1915, there were 12 public defender bills introduced in various state legislatures.)

The idea has won the vigorous support of leading newspapers and magazines, from Maine to California. The public defender proposal is no "passing fancy." It is being generally recognized as vital, fundamental and humane. The American sense of "fair play" is the dominant note underlying the force and development of the movement to remedy inherent defects in the criminal system. The advantages of the proposed plan so greatly outweigh the objections thereto as to justify giving it a fair test.

It requires merely the awakening of the public conscience to bring about further progressive legislation. Our people are fully alive to the economic, social and financial needs of the country. "Preparedness" is the national slogan of the day. In the general desire to obtain adequate protection from all manner of foes, within or without, we must not overlook the importance of safeguarding the lives and liberties of our citizens so that no injustice be done them. We should make our judicial system safe from attack. It should be emblematic of the

highest ethical principles. May we not reasonably expect, when serious thought is directed toward the consideration of a higher ideal in the administration of justice, that the people will, with all the force and power of an aroused public opinion, demand the establishment of a public defender?

It is a National Necessity.